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No. 95-232

In the Supreme Court of the United States

OCTOBER TERM, 1995

LLOYD HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the requirement of the Suits in Admiralty Act that a complaint be served "forthwith" has been superseded by Federal Rule of Civil Procedure 4(j) (1988), which requires service within 120 days.

2. Whether the district court correctly dismissed petitioner's complaint for failure to effect service "forthwith."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-7) is reported at 51 F.3d 574. The order of the district court (Pet. App. 8-9) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 10, 1995. The petition for a writ of certiorari was filed on August 8, 1995, and was granted on November 22, 1995 (116 S. Ct. 493). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES AND RULES INVOLVED

The following statutes and rules are set forth in the appendix to this brief: 28 U.S.C. 2072 (Rules

Enabling Act); 46 U.S.C. App. 742 and 743 (Suits in Admiralty Act); Federal Rule of Civil Procedure 4(j) (1988); and Federal Rule of Civil Procedure 82.

STATEMENT

A. Statutory Background

1. Prior to 1916, the doctrine of sovereign immunity barred any admiralty suit against the United States. In order to redress harms done to private parties by the government's vessels and alleviate the need for private bills designed to compensate such persons, Congress in 1916 enacted the Shipping Act, ch. 451, 39 Stat. 728. That statute "establish[ed] a United States Shipping Board for the purpose of encouraging, developing, and creating a naval auxiliary and naval reserve and a merchant marine." 39 Stat. 728 (preamble). Section 9 of the Act provided that Shipping Board vessels employed as merchant vessels were subject to "all laws, regulations, and liabilities governing merchant vessels." 39 Stat. 730-731.

In *The Lake Monroe*, 250 U.S. 246 (1919), this Court construed the Shipping Act as subjecting Shipping Board merchant vessels to all the incidents of private in rem admiralty actions, including arrest and seizure of the vessel. As a result of the *Lake Monroe* decision, the United States was required to appear and post bond for the release of vessels arrested and seized pursuant to in rem admiralty proceedings. See *Blamberg Bros.* v. *United States*, 260 U.S. 452, 458-459 (1923). The Suits in Admiralty Act (SAA), ch. 95, 41 Stat. 525 (1920) (46 U.S.C. App. 741-752), enacted in response to the decision in *Lake Monroe*,[1] represents

[1] See *Blamberg Bros.*, 260 U.S. at 458 (SAA "was passed to avoid the embarrassment to which the Government found itself

Congress's effort to permit the adjudication of admiralty actions against the United States in a manner that does not unduly interfere with the government's conduct of maritime operations.[2] See generally *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 170-171 (1976); *Stevens Technical Services, Inc.* v. *United States*, 913 F.2d 1521, 1527 (11th Cir. 1990).

Section 1 of the SAA provides that "[n]o vessel owned by the United States * * * [shall] be subject

subjected by the [Shipping Act], by the ninth section of which vessels in which the United States had an interest and which were employed as merchant vessels were made liable as such to arrest or seizure for enforcement of maritime liens") (citing *Lake Monroe*).

[2] The legislative history of the SAA indicates that Congress was made aware of a need for promptness in admiralty litigation, including suits against the United States. Ira A. Campbell, a Special Assistant to the Attorney General in Admiralty who helped to draft the SAA, testified that

> [t]his bill * * * is providing the machinery by which all admiralty litigation can be handled. Here is what you are facing as the result of the conditions to-day * * *. There is no litigation which requires such prompt and immediate action, if it is properly taken care of, as admiralty litigation[,] * * * because your witnesses are all sailors, as a rule; your vessels come into the port where sailors disappear and you can not find them. So it may be that your case will be won or lost upon the one man whom it is impossible to locate. * * * [I]nasmuch as Congress is passing these [private] bills constantly, and creating the right of suit in such cases, it might be well to consider the advisability of authorizing such litigation, so that such litigation may be taken care of promptly by the Government.

Suits in Admiralty Against the United States: Hearing on S. 2253 Before the Senate Comm. on Commerce, 66th Cong., 1st Sess. 27-28 (1919).

to arrest or seizure by judicial process in the United States or its possessions." 46 U.S.C. App. 741. Section 2 of the Act replaces the in rem action with the right to file a "libel in personam." 46 U.S.C. App. 742.[3] Section 742 states that, "[i]n cases where if such vessel were privately owned or operated, * * * a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States." 46 U.S.C. App. 742.[4] That Section requires that "[t]he libelant shall forthwith serve a copy of his libel on the United States attorney for such district [the district in which suit is filed] and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States." *Ibid.*[5]

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[3] "In the parlance of admiralty law, a 'libel' is a complaint." *Interpool Ltd.* v. *Char Yigh Marine (Panama) S.A.*, 890 F.2d 1453, 1457 n.8 (1989) (citing G. Gilmore & C. Black, *The Law of Admiralty* § 1-12, at 34 (1st ed. 1957)), amended on denial of reh'g, 918 F.2d 1476 (9th Cir. 1990).

[4] See *United States Shipping Board Emergency Fleet Corp.* v. *Rosenberg Bros. & Co.*, 276 U.S. 202, 212 (1928) (SAA serves "to exempt from seizure and arrest merchant vessels of the United States operated by it and its subordinate shipping corporations and to substitute for a suit in rem one in personam * * * in which the personal liability of the United States took the place of the vessel").

[5] The first in a succession of bills providing for suits in admiralty against the United States was introduced as S. 3295, 50th Cong., 1st Sess. (1888). It was not until 1910, however, that the forthwith service language appeared in these legislative proposals. In hearings before a subcommittee of the Senate Judiciary Committee, the following colloquy occurred between

Section 3 of the SAA states that "[s]uch suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties." 46 U.S.C. App. 743. Section 743 further provides that, "[i]f the libelant so elects in his libel, the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit." *Ibid.*; see *Canadian Aviator* v. *United States*, 324 U.S. 215, 226-227 (1945) (SAA permits recovery against the United States under either in personam or in rem principles). Section 5 of the Act states that suits under the SAA "may be brought only within two

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Senator Brandegee and Archibald G. Thacher, Proctor in Admiralty, who appeared before the subcommittee:

> Senator Brandegee. In section 3 should there not be some provision as to when all these things should be done?
>
> Mr. Thacher. The filing of the libel would have to be done within two years of the cause of action.
>
> Senator Brandegee. But the serving of the Attorney-General?
>
> Mr. Thacher. I should say serve "forthwith." There is no reason why it should not be done promptly after the filing of the libel.

Amendments to Admiralty Law: Hearings Before the Subcomm. of the Senate Comm. on the Judiciary, 61st Cong., 2d Sess. 16 (1910). The next version of the bill, S. 7627, 61st Cong., 2d Sess. (1910), contained the requirement that the libel be served "forthwith."

years after the cause of action arises." 46 U.S.C. App. 745.

2. The Clarification Act of March 24, 1943, ch. 26, § 1, 57 Stat. 45, provides an action for claims arising from employment in the crew of vessels owned by the United States through the Maritime Administration, the successor to the War Shipping Administration.[6] The statute provides that

> [o]fficers and members of crews (hereinafter referred to as "seamen") employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration shall, with respect to * * * death, injuries, illness, maintenance and cure, loss of effects, detention or repatriation, * * * have all of the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels.

50 U.S.C. App. 1291(a). See generally *Martin* v. *Miller*, 65 F.3d 434, 437-438 (5th Cir. 1995) (discussing history of the Clarification Act). The Act further provides that such claims "shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act." 50 U.S.C. App. 1291(a).[7]

3. At the times that petitioner filed and served his complaint in the instant case, Federal Rule of Civil Procedure 4(j) (1988) provided as follows:

> If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

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[6] "[D]uring most of the Second World War substantially our entire merchant marine became part of a single vast shipping pool, said to have been the largest in history, operated and controlled by the United States through the War Shipping Administration." *Hust* v. *Moore-McCormack Lines, Inc.*, 328 U.S. 707, 709 (1946) (footnote omitted). The War Shipping Administration was established by Executive Order on February 7, 1942. See *id.* at 709 n.2. Approximately three years after the passage of the Clarification Act, the functions of the War Shipping Administration were transferred to the United States Maritime Commission (the successor agency to the Shipping Board, see *id.* at 717 n.21) by the Act of July 8, 1946, ch. 543, § 202, 60 Stat. 501, and subsequently to its successor agency the Maritime Administration. Reorganization Plan No. 21 of 1950, 64 Stat. 1273; see *Martin* v. *Miller*, 65 F.3d 434, 439 (5th Cir. 1995). The Maritime Administration was transferred from the Department of Commerce to the Department of Transportation by the Maritime Act of 1981, Pub. L. No. 97-31, 95 Stat. 151.

[7] The Clarification Act states that "[t]he term 'administratively disallowed' means a denial of a written claim in accordance with rules or regulations prescribed by the Administrator, War Shipping Administration." 50 U.S.C. App. 1291(a). See *McMahon* v. *United States*, 342 U.S. 25, 26-28 (1951) (discussing administrative claim requirement). The Maritime Administration's current regulation governing administrative claims is set forth at 46 C.F.R. Part 327.

Effective December 1, 1993, Rule 4(j) was renumbered 4(m) and was amended in respects not relevant to this case.[8]

B. Proceedings Below

1. After complying with the administrative claim requirement of the Clarification Act (see J.A. 18), petitioner filed a seaman's personal injury action against the United States on April 8, 1993. See J.A. 5-12 (complaint).[9] The complaint alleged that petitioner

[8] At the times that the complaint in this case was filed and served, Federal Rule of Civil Procedure 4(d)(4) (1988) provided that a complaint shall be served upon the United States "by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States." Federal Rule of Civil Procedure 12(a) (1988) provided that "[t]he United States * * * shall serve an answer to the complaint * * * within 60 days after the service upon the United States attorney."

[9] Petitioner's complaint invoked both the SAA and the Public Vessels Act (PVA), 46 U.S.C. App. 781-790. See J.A. 5. The PVA provides that "[a] libel in personam in admiralty may be brought against the United States * * * for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States." 46 U.S.C. App. 781. See *United Continental Tuna*, 425 U.S. at 171-172 (discussing history and purpose of PVA). Because the Clarification Act provides that claims arising from employment aboard Maritime Administration vessels "shall * * * be enforced pursuant to the provisions of the Suits in Admiralty Act," 50 U.S.C. App. 1291(a), see pages 6-7, *supra*, petitioner had no cause of action under the PVA. In any event, the

had suffered "serious and permanent injuries * * * on or about August 27, 1991," J.A. 6, while acting "in the course and scope of his employment aboard the vessel in question," J.A. 7. Although petitioner's attorneys maintained their offices in Houston, see J.A. 12, the complaint was filed in the Galveston Division of the Southern District of Texas rather than in the Houston Division. See Pet. Br. 4; J.A. 5.[10]

Petitioner's attorneys thereafter sought to obtain the appropriate summons forms by mail. Pet. Br. 4-5; J.A. 51-52.[11] They also engaged a local "constable" to effectuate service on the United States. Pet. Br. 4-5; J.A. 52, 55-56. Those indirect dealings with the Gal-

requirement of "forthwith service" applies equally to PVA actions, since the PVA provides that "[s]uch suits shall be subject to and proceed in accordance with the provisions of" the SAA. 46 U.S.C. App. 782.

[10] Suits under the SAA may be brought "in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found." 46 U.S.C. App. 742. The complaint in this case alleged that petitioner resided within the Southern District of Texas. J.A. 6. The record contains no explanation of petitioner's decision to file suit in the Galveston Division rather than in the Houston Division.

[11] At the times that petitioner's complaint was filed and served, Federal Rule of Civil Procedure 4(a) (1988) provided: "Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver the summons to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint." Rule 4(b) provided that "[t]he summons shall be signed by the clerk [and] be under the seal of the court." Rule 4(d) stated that "[t]he summons and complaint shall be served together." The substance of those provisions is retained in current Rules 4(a), (b), and (c)(1).

veston district court's clerk's office precipitated a series of mishaps with the mail and, apparently, with counsel's ability to secure properly completed summons forms. Pet. Br. 5; J.A. 52. The Attorney General received a copy of the complaint (served on her by mail) on May 25, 1993, 47 days after it was filed. See Pet. Br. 5; J.A. 52. On August 30, 1993, 144 days after filing his complaint, petitioner filed a motion for postponement in the district court, in which he claimed to have been unable to complete service on the appropriate United States Attorney due to difficulties obtaining the proper summons form and with the mail. Pet. Br. 6; J.A. 13-14; Pet. App. 2. The court granted petitioner 15 days to complete service, J.A. 15, and the United States Attorney was served on September 3, 1993, 148 days after petitioner filed suit. Pet. Br. 6; J.A. 33-34; Pet. App. 2. On the government's unopposed motion, the case was subsequently transferred to the Eastern District of Texas, Beaumont Division. See J.A. 43.[2]

2. The United States moved to dismiss the action, arguing that petitioner's failure to effect service of the complaint "forthwith," as required by the SAA, deprived the court of subject-matter jurisdiction. The district court denied the motion without opinion. Pet. App. 2. After the district court denied the motion, the Fifth Circuit issued its opinion in *United States* v. *Holmberg*, 19 F.3d 1062, cert. denied, 115 S. Ct. 482 (1994). The court in *Holmberg* held that the SAA's waiver of sovereign immunity is conditioned

[2] Section 2 of the SAA provides that "[u]pon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States." 46 U.S.C. App. 742.

upon the plaintiff's compliance with Section 2 of the SAA, 46 U.S.C. App. 742. 19 F.3d at 1064. Because "[c]onditions to a waiver of sovereign immunity are necessarily jurisdictional in nature," *ibid.*, the court reasoned, a plaintiff's failure to effect service of a complaint upon the government "forthwith," as required by Section 742, deprives the district court of jurisdiction over his claim, 19 F.3d at 1065. The court also held that Section 742 "involves substantive rights because it defines the scope of the Government's consent to be sued," and that its requirements therefore could not be modified by Federal Rule of Civil Procedure 4(j). 19 F.3d at 1065. The court "agree[d] that there has been no uniform definition of forthwith" but concluded that, "under any definition, service in 103 or 106 days" would not satisfy the requirements of Section 742. 19 F.3d at 1065. In light of the Fifth Circuit's decision in *Holmberg*, the district court in the instant case reconsidered its ruling and dismissed petitioner's complaint without prejudice for lack of subject-matter jurisdiction. Pet. App. 2, 8-9.

3. The court of appeals affirmed. Pet. App. 1-7. Because the requirements of Section 742 are jurisdictional, the court held, the district court's decision to grant petitioner a 15-day extension to file his complaint "did not affect either the court's subject-matter jurisdiction or [petitioner's] obligations under § 742." Pet. App. 5-6. Relying on *Holmberg*, the court held that petitioner, who had served his complaint on the United States Attorney 148 days after it was filed, could not be said to have effected service "forthwith." Pet. App. 6. Finally, the court held that the word "forthwith" in Section 742 "applies both to the service of a copy of the complaint on the United States Attorney and to the mailing of a copy of the complaint

by registered mail to the Attorney General of the United States." Pet. App. 7. The court therefore declined to decide whether service of the complaint on the Attorney General (47 days after its filing) had been effected "forthwith," explaining that service upon the Attorney General alone would not, in any event, suffice to satisfy the requirements of Section 742. Pet. App. 7.[13]

SUMMARY OF ARGUMENT

1. The statutory requirement that the complaint in an SAA suit be served "forthwith" has not been impliedly repealed by Federal Rule of Civil Procedure 4(j), which generally mandates that a complaint not served within 120 days shall be dismissed without prejudice. This Court has repeatedly emphasized that, "where two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1018 (1984) (internal quotation marks omit-

[13] The Fifth Circuit's decision in the instant case was in accord with rulings of the Second, Ninth, and Eleventh Circuits, the other circuits that hear the vast majority of admiralty cases. See, *e.g.*, *Libby* v. *United States*, 840 F.2d 818, 819-821 (11th Cir. 1988); *Amella* v. *United States*, 732 F.2d 711, 713 (9th Cir. 1984); *Kenyon* v. *United States*, 676 F.2d 1229, 1231 (9th Cir. 1981); *Battaglia* v. *United States*, 303 F.2d 683, 685-686 (2d Cir.), cert. dismissed, 371 U.S. 907 (1962). The Third Circuit has expressed the contrary view, stating that "Rule 4(j) * * * supersedes the Suits in Admiralty Act's requirement of forthwith service." *Jones & Laughlin Steel, Inc.* v. *Mon River Towing, Inc.*, 772 F.2d 62, 66 (3d Cir. 1985). That statement was dictum, however, since the Third Circuit held that it lacked jurisdiction under the SAA and that jurisdiction existed only under the Federal Tort Claims Act. *Id.* at 64-65.

ted). Rule 4(j) does not confer an affirmative right to take 120 days to serve the complaint. It simply states that, "[i]f service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court * * * shall dismiss the action without prejudice." The Rule thereby establishes an outer boundary for timely service in federal civil cases generally. The determination that *no* plaintiff (absent a showing of good cause) should take more than 120 days to serve a complaint is in no way inconsistent with Congress's decision to require immediate service in a particular category of cases.

Contrary to petitioner's argument, the SAA was not intended to subject the United States to the entire body of law applicable to admiralty suits between private parties. With respect to matters not covered by a specific provision of the SAA, the statute makes clear that SAA suits "shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties." 46 U.S.C. App. 743. Congress might have permitted the time for service of the complaint to be similarly governed by the rules applicable to suits against private defendants, but it chose to insist that the complaint be served "forthwith." In other respects as well—*e.g.*, a shortened statute of limitations, and a prohibition on the arrest and seizure of the purportedly offending vessel—the SAA specifies a rule different from that applicable to private admiralty litigation. Nothing in the Federal Rules of Civil Procedure undermines Congress's determination that certain matters, including the time for serving the complaint, should be the subject of an SAA-specific rule rather than left to the general

principles governing most litigation against private defendants.

2. Even if Rule 4(j) were generally construed to confer an affirmative right to serve the complaint at any time within the 120-day period, it could not supersede the SAA's requirement that the complaint be served "forthwith." It is well established that "[s]overeign immunity is jurisdictional in nature," and that "the terms of the United States' consent to be sued in any court define that court's jurisdiction to entertain the suit." *FDIC* v. *Meyer*, 114 S. Ct. 996, 1000 (1994) (brackets and internal quotation marks omitted). Compliance with the SAA's requirement of forthwith service is therefore a condition precedent to the district court's exercise of jurisdiction over the suit. The Rules Enabling Act provides that the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. 2072(b). Federal Rule of Civil Procedure 82 states, moreover, that the Rules "shall not be construed to extend or limit the jurisdiction of the United States district courts." To construe Rule 4(j) as excusing compliance with a statutory condition on the government's waiver of sovereign immunity would be contrary to both the Rules Enabling Act and Rule 82.

3. "'Forthwith' connotes action which is immediate, without delay, prompt, and with reasonable dispatch." *Amella* v. *United States*, 732 F.2d 711, 713 (9th Cir. 1984). "In matters of practice and pleading it is usually construed, and sometimes defined by rule of court, as within twenty-four hours." *Dickerman* v. *Northern Trust Co.*, 176 U.S. 181, 193 (1900). Even accepting petitioner's declarations in their entirety, it is clear that petitioner's trial counsel made no effort to effect immediate service of the complaint in

this case. The district court was therefore correct in dismissing the complaint without prejudice based on petitioner's non-compliance with the forthwith service requirement.

ARGUMENT

I. THE REQUIREMENT THAT A COMPLAINT UNDER THE SUITS IN ADMIRALTY ACT MUST BE SERVED "FORTHWITH" HAS NOT BEEN SUPERSEDED BY RULE 4(J) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Section 2 of the Suits in Admiralty Act (SAA) requires that the complaint in an SAA case must be served "forthwith" upon the Attorney General and the United States Attorney. 46 U.S.C. App. 742. "'Forthwith' connotes action which is immediate, without delay, prompt, and with reasonable dispatch." *Amella* v. *United States*, 732 F.2d 711, 713 (9th Cir. 1984) (Kennedy, J.) (citing *City of New York* v. *McAllister Bros., Inc.*, 278 F.2d 708, 710 (2d Cir. 1960)); *Black's Law Dictionary* 654 (6th ed. 1990). Petitioner contends, however, that Section 742's requirement of "forthwith service" no longer has the force of law. Specifically, he argues that the adoption of the Federal Rules of Civil Procedure, their subsequent application to admiralty cases, and the promulgation of Federal Rule of Civil Procedure 4(j), setting a general 120-day limit for service of the complaint in federal civil suits, have impliedly repealed the requirement that an SAA complaint be served "forthwith." Pet. Br. 22-24. To support that view, petitioner relies (see Pet. Br. 28-29) on the

Rules Enabling Act of 1934, as amended. That statute provides, in pertinent part:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure * * * for cases in the United States district courts * * *.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

28 U.S.C. 2072.[14]

Petitioner's reliance on Section 2072(b) is misplaced. First, the SAA's requirement that the complaint be served "forthwith" is not "in conflict with" Rule 4(j). Second, to construe Rule 4(j) as superseding the SAA's requirement of forthwith service would impermissibly expand the jurisdiction of the district court, in violation of both 28 U.S.C. 2072(b) and Federal Rule of Civil Procedure 82.

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[14] As petitioner explains (Pet. Br. 31-33), Rule 4(j) was not promulgated by this Court pursuant to the Rules Enabling Act, but was enacted into law as part of the Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. No. 97-462, § 2, 96 Stat. 2527 (1983). Section 2072(b)'s references to "such rules" (*i.e.*, rules of procedure prescribed by this Court) are therefore technically inapplicable to Rule 4(j). We agree with petitioner, however, that Section 2072(b) provides the best evidence of congressional intent regarding the proper construction of Rule 4(j) and its interaction with other laws.

A. The SAA's Requirement That The Complaint Be Served "Forthwith" Is Not "In Conflict With" Rule 4(j)

This Court has repeatedly emphasized that, "where two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1018 (1984) (internal quotation marks omitted). "Redundancies across statutes are not unusual events in drafting, and so long as there is no 'positive repugnancy' between two laws, a court must give effect to both." *Connecticut National Bank* v. *Germain*, 503 U.S. 249, 253 (1992) (quoting *Wood* v. *United States*, 41 U.S. (16 Pet.) 342, 363 (1842)).[15] Nothing in the Rules Enabling Act suggests that this principle is inapplicable to the implementation of the Federal Rules. Section 2072(b) makes clear that a provision of law "in conflict with" a Federal Rule is generally superseded, but it does not suggest that other than the normal analysis is to be employed in determining whether such a conflict exists. In the present case, Section 742 and Rule 4(j) are fully capable of co-existence, and each should therefore be regarded as effective.

1. Rule 4(j) provides, in pertinent part, that, "[i]f a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service

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[15] See also *Morton* v. *Mancari*, 417 U.S. 535, 550-551 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.").

was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion." Rule 4(j) does not confer an affirmative right to take 120 days to serve the complaint. It does not say, for example, that "the complaint may be served at any time within 120 days after filing," or that "no complaint served within 120 days will be dismissed for untimely service." Indeed, the Rule does not by its terms address the proper treatment of complaints that are served within the 120-day period. See *Amella* v. *United States*, 732 F.2d at 713 ("Rule 4(j) sets 120 days as a presumption of unreasonable and dilatory delay in service of the complaint in any civil suit. As such, it fixes an outer limit on service but does not indicate what lesser time period qualifies as forthwith.").[16] There is conse-

[16] Petitioner relies (see Pet. Br. 29-30) on this Court's decision in *Hanna* v. *Plumer*, 380 U.S. 460 (1965). Massachusetts law required in-hand service of a complaint upon the executor or administrator of an estate, *id.* at 462, while Federal Rule of Civil Procedure 4(d) stated that service of the summons and complaint "shall be made as follows: (1) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein." 380 U.S. at 461. The Court held that the Massachusetts rule did not apply, stating that "the clash [between the two provisions] is unavoidable; Rule 4(d)(1) says—implicitly, but with unmistakable clarity—that in-hand service is not required in federal courts." *Id.* at 470.

Hanna is distinguishable in two respects. First, the question whether a state procedural rule should be *incorporated* into federal practice in diversity litigation is different from the

quently no "positive repugnancy" between Section 742 and Rule 4(j), and each may be enforced according to its terms.[17]

Petitioner's only effort to explain why Section 742 is "in conflict with" Rule 4(j) is the statement that "the 'forthwith' requirement of the SAA and Rule 4 service requirements are clearly repugnant since courts have construed the term 'forthwith' as considerably shorter than the 120 days allowed by Rule 4." Pet. Br. 30.[18] In a similar vein, one commentator

question whether a federal statutory provision specifically addressed to SAA litigation should be enforced according to its terms. Indeed, the Court in *Hanna* deemed it "doubtful" that the Massachusetts requirement of in-hand service would have applied in a diversity case even if there had been no pertinent Federal Rule. 380 U.S. at 466. Second, the Court appears to have construed Rule 4(d) as conferring an affirmative right to serve process in any of the specified ways. See also *Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 749 (1980) (*hanna* analysis applies only where there is "a 'direct collision' between the Federal Rule and the state law"). For the reasons stated in the text, Rule 4(j) confers no affirmative right to take up to 120 days to serve a complaint.

[17] Petitioner argues (Pet. Br. 33) that, "[i]f Congress intended there to be any exception to the general rule it was prescribing [in Rule 4(j)], it certainly could have created exceptions." The requirement that SAA complaints be served "forthwith," however, is not an exception to the rule that any complaint not served within 120 days must (absent a showing of good cause) be dismissed.

[18] Petitioner also relies (Pet. Br. 23, 27) on the 1937 Advisory Committee Notes to Rule 4, which state that Rule 4 "provide[s] a uniform and comprehensive method of service for all actions against the United States," and that other federal statutes "are modified in so far as they prescribe a different method of service or dispense with the service of a summons." Fed. R. Civ. P. 4 advisory committee's note (1937 Adoption). By their

argues that "the 'forthwith' requirement of the SAA and Rule 4(j) directly collide, because by allowing 120 days for service before dismissal, 4(j) treats as timely, service that would be untimely under a forthwith service requirement." G. Reesa, Note, *Rule 4(j) of the Federal Rules of Civil Procedure and the Forthwith Service Requirement of the Suits in Admiralty Act*, 54 Fordham L. Rev. 1195, 1205-1206 (1986). This Court has made clear, however, that, in determining whether a "positive repugnancy" exists between two statutes, "[i]t is not enough to show that the two statutes produce differing results when applied to the same factual situation." *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 155 (1976). See also *United States* v. *Batchelder*, 442 U.S. 114, 121 (1979) (later statute held not to repeal an earlier law even though the two "provide[d] different penalties for essentially the same conduct"). That Rule 4(j) does not itself mandate immediate service does not mean that it conflicts with a statutory provision imposing such a requirement.[19]

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terms, those comments refer to the *method* rather than to the timing of service. Cf. Pet. Br. 10 (noting that "[t]he manner of service on the United States under the SAA and Rule 4 is essentially the same"). The Advisory Committee evidently concluded that a federal statute prescribing a method of service different from that required by Rule 4 was "in conflict with" the Rule and therefore superseded. That conclusion was understandable, given Rule 4's statement that "[s]ervice shall be made as follows"; but it has no bearing on the question whether the SAA's "forthwith" service requirement is "in conflict with" Rule 4(j).

[19] Rule 4(j) unquestionably conveys the implicit message that complaints filed within the 120-day period will not be dismissed *for non-compliance with that Federal Rule*. Nothing in the text of Rule 4(j), however, purports to supersede an independent statutory provision requiring immediate service in a particular category of cases.

2. Nor does continued enforcement of Section 742's forthwith service requirement obstruct the effectuation of the purposes underlying Rule 4(j). Rule 4(j) applies to the full range of civil cases: it reflects Congress's conclusion that a 120-day limit on the time for service generally strikes an appropriate balance between the goal of conducting litigation expeditiously and the goal of discouraging dismissals on grounds unrelated to the merits. The determination that a 120-day limit is generally appropriate (*i.e.*, that *no* plaintiff, absent a showing of good cause, should take more than 120 days to serve a complaint), however, is in no way inconsistent with a requirement of immediate service in a particular category of cases. Congress could have reasonably concluded that there is a special need for expeditious adjudication of admiralty litigation. See note 2, *supra*; see also *Marich* v. *United States*, 84 F. Supp. 829, 832 (N.D. Cal. 1949) (purpose of forthwith service requirement is to provide seasonable opportunity for the government to investigate). Congress could also have concluded that immediate service of the complaint is both more important and more practicable in suits against the government than in litigation against private parties.[20] There is consequently no reason to

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[20] In light of the large volume of suits against the government and the public interest in litigation that may bear on the public fisc, Congress might reasonably seek to increase the precision with which governmental entities may estimate the range of their potential liabilities at a given point in time. The 120-day time limit established by Rule 4(j) may also reflect Congress's recognition that a private defendant may be difficult to locate at the time the complaint is filed. No similar

construe Rule 4(j) as superseding Congress's specific determination of the appropriate period for service in suits brought under the SAA.[21]

3. Petitioner also argues that Congress, in enacting the SAA, intended that actions brought pursuant to it be governed in their entirety by the legal rules applicable to admiralty suits against private defendants. See Pet. Br. 17 ("the plain language of the SAA declared Congress's intent that the government should be treated in the same manner as private litigants"). He states as well that "Congress's more likely intent for including the forthwith requirement in the SAA was simply to provide a time frame for service because no external rule regarding the timeliness of service existed when Congress enacted the SAA in 1920," well before the adoption of the Federal

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practical difficulties attend the requirement that the United States Attorney and the Attorney General must be served "forthwith."

[21] In a closely related context, this Court has noted that "state law is pre-empted to the extent that it actually conflicts with federal law." *English* v. *General Electric Co.*, 496 U.S. 72, 79 (1990). The Court has explained that a "conflict" between state and federal law requiring displacement of the state law occurs "where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Ibid.* (citation and internal quotation marks omitted). Obviously it is not "impossible" to comply with both Section 742 and Rule 4(j): A complaint that is served "forthwith" will be timely under both provisions. For the reasons stated at pages 21-22, *supra*, enforcement of Section 742's forthwith service requirement in the category of cases to which it applies will not "stand[] as an obstacle to the accomplishment and execution" of the purposes underlying Rule 4(j).

Rules of Civil Procedure in 1938. Pet. Br. 22. Those contentions are incorrect.

a. Section 3 of the SAA provides that, with respect to questions that the Act does not specifically address, SAA suits "shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties." 46 U.S.C. App. 743. The statute does not otherwise provide, however, for general uniformity of treatment of governmental and private defendants in admiralty litigation. Indeed, the initial impetus behind the SAA was Congress's recognition that one of the traditional incidents of admiralty practice—the arrest and seizure of the purportedly offending vessel—had proved disruptive and undesirable in suits against the United States. See 46 U.S.C. App. 741 ("No vessel owned by the United States * * * [shall] be subject to arrest or seizure by judicial process in the United States or its possessions."); pages 2-3, *supra*. In other respects as well, the SAA specifies a rule different from that applicable to private admiralty litigation. Suits under the SAA, for example, are subject to a shorter statute of limitations than are other admiralty actions. Compare 46 U.S.C. App. 745 ("Suits as authorized by [the SAA] may be brought only within two years after the cause of action arises.") with 46 U.S.C. App. 763a ("Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued."). Trial by jury is not permitted under the SAA. 46 U.S.C. App. 742 (SAA permits "appropriate nonjury proceeding"). Where the decree is for a money judgment, the court

may award "interest at the rate of 4 per centum until satisfied." 46 U.S.C. App. 743.[22] The fact that the Federal Rules (rather than the rules of local practice)[23] now govern many of the questions that the SAA does not specifically address does not undermine Congress's determination that certain issues (including the timeliness of service of the complaint) should

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[22] Petitioner relies (Pet. Br. 17-18) on this Court's statement in *United States* v. *Isthmian S.S. Co.*, 359 U.S. 314, 324 (1959), that "Congress has expressly declared that when sued under the Suits in Admiralty Act the United States is to have its procedural rights determined and governed in the same manner as private parties." On the next page of its opinion, however, the Court addressed the question whether compound interest had properly been awarded against the United States in that SAA suit. The Court did not suggest that compound interest would have been unavailable in an analogous suit between private parties. It determined, however, that the SAA provision governing interest did not authorize the amounts awarded by the district court. *Id.* at 325. And it concluded that "Congress' demonstrated concern with the problem of interest under the Suits in Admiralty Act indicates that it intended to cover these awards affirmatively and not have them controlled by the general command that the suit 'shall proceed and shall be heard and determined according to the principles of law' applicable to private parties." *Ibid.* The same analysis is controlling here.

[23] When the SAA was enacted, private admiralty litigation in the federal courts was governed by the Admiralty Rules of 1844, superseded shortly after the SAA's passage by the Admiralty Rules of 1920. Those Rules provided little detail with respect to the conduct of in personam admiralty suits, and courts adjudicating such actions often looked to state practice in resolving procedural issues that the Admiralty Rules did not address. See, *e.g.*, *In re Louisville Underwriters*, 134 U.S. 488, 493 (1890); *Doe* v. *Springfield Boiler & Mfg. Co.*, 104 F. 684, 686 (9th Cir. 1900); *Norfolk Southern R.R.* v. *Foreman*, 244 F. 353, 355 (4th Cir. 1917).

be the subject of an SAA-specific rule rather than left to the background principles governing private litigation.[24]

b. Section 743's general provision that SAA litigation should be governed by the rules applicable to private parties is inconsistent with petitioner's speculation (Pet. Br. 22) that Congress chose to require forthwith service only "because no external rule regarding the timeliness of service existed when Congress enacted the SAA in 1920." As Section 743 makes clear, Congress was not under the misimpression that the absence of uniform federal rules of procedure required it to enact a comprehensive code governing the conduct of SAA litigation. To the contrary, Congress was generally content to provide that SAA litigation "shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties." 46 U.S.C. App. 743. Congress might have permitted the time for service of the complaint to be similarly governed by the rules applicable to private parties, but it chose instead to insist that the complaint be served "forthwith." The subsequent adoption of the Federal Rules provides no

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[24] Congress has made substantive amendments to the SAA on four occasions since 1920 without deleting the requirement that the complaint be served "forthwith." See Maritime Act of 1981, Pub. L. No. 97-31, § 12(25), 95 Stat. 155 (codified as amended at 46 U.S.C. 743, 747, 749-752); Act of Aug. 29, 1972, Pub. L. No. 92-417, § 3, 86 Stat. 656 (codified as amended at 46 U.S.C. 749); Act of Sept. 13, 1960, Pub. L. No. 86-770, § 3, 74 Stat. 912 (codified as amended at 46 U.S.C. 742); Act of Dec. 13, 1950, ch. 1136, 64 Stat. 1112 (codified as amended at 46 U.S.C. 745).

reason to decline to enforce that requirement according to its terms.

B. Even If Rule 4(j) Were Otherwise Construed To Confer An Affirmative Right To Serve A Complaint At Any Time Within The 120-Day Period, Its Application To SAA Litigation Would Be Contrary To Both 28 U.S.C. 2072(b) And Federal Rule of Civil Procedure 82

Even if Rule 4(j) were otherwise construed to confer an affirmative right to serve a complaint at any time within the 120-day period, its application (so construed) to SAA litigation would expand the jurisdiction of the district courts and would have the effect of altering the parties' substantive rights. Those results would be contrary to the Rules Enabling Act, 28 U.S.C. 2072(b) (the Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right"), and Federal Rule of Civil Procedure 82 ("These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein.").

1. "It is elementary that the United States, as sovereign, is immune from suit save as it consents to be sued." *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980). It is also well established that "[s]overeign immunity is jurisdictional in nature," and that "the terms of the United States' consent to be sued in any court define that court's jurisdiction to entertain the suit." *FDIC* v. *Meyer*, 114 S. Ct. 996, 1000 (1994) (brackets and internal quotation marks omitted). Moreover, while "legislation for the benefit of seamen is to be construed liberally in their favor, it is equally true that statutes which waive immunity of the United States from suit are to be construed strictly

in favor of the sovereign." *McMahon* v. *United States*, 342 U.S. 25, 27 (1951). To permit a district court to adjudicate an SAA action in which the statutory preconditions for suit have not been met would effect an expansion of the court's jurisdiction and a modification of the parties' substantive rights. A construction of Rule 4(j) that would supersede the forthwith service requirement of Section 742 is therefore contrary to both 28 U.S.C. 2072(b) and Rule 82.

2. That conclusion is buttressed by the structure of the SAA. Section 742 provides the government's waiver of sovereign immunity ("In cases where if such vessel were privately owned or operated, * * * a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States") and requires that the complaint be served "forthwith." 46 U.S.C. App. 742. Section 743 governs "[p]rocedure in cases of libel in personam" and provides that SAA litigation "shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties." 46 U.S.C. App. 743. The structure of the statute thus suggests that the forthwith service requirement is not simply a procedural provision that applies after the district court has properly assumed jurisdiction over the case. See *United States* v. *Holmberg*, 19 F.3d 1062, 1064 (5th Cir.), cert. denied, 115 S. Ct. 482 (1994); *Libby* v. *United States*, 840 F.2d 818, 820 (11th Cir. 1988). Rather, it is a prerequisite to the plaintiff's invocation of the court's jurisdiction in the first instance. See *Amella* v. *United States*, 732 F.2d at 713. Section 742's requirements must therefore be satisfied before the statutory waiver of

sovereign immunity may be given effect. *Holmberg*, 19 F.3d at 1064. See also *Battaglia* v. *United States*, 303 F.2d 683, 685 (2d Cir.) ("There can be little doubt of the power of the sovereign to declare the manner in which it may be haled into court."), cert. dismissed, 371 U.S. 907 (1962).

3. There is nothing remarkable about the proposition that a rule requiring particular documents to be filed at a specified time can be "jurisdictional" in nature. The courts have recognized, for example, that the administrative claim requirement of the Clarification Act is a jurisdictional rule. See, *e.g.*, *Rodinciuc* v. *United States*, 175 F.2d 479, 481 (3d Cir.) ("A clear failure to comply with the conditions laid down by statute for suits against the United States may not be waived."), cert. denied, 338 U.S. 895 (1949); *Danstrup* v. *The Richmond P. Hobson*, 112 F. Supp. 851, 855 (E.D.N.Y. 1953) (Clarification Act's administrative claim requirement "involves the proper fulfillment of a statutory condition to bringing an action against the United States," and plaintiff's failure to comply with that condition "requires that the court dismiss the libel on the ground of lack of jurisdiction").[25]

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[25] The courts have consistently reached the same conclusion with respect to the administrative claim requirement of the Federal Tort Claims Act (FTCA), 28 U.S.C. 2675. See, *e.g.*, *Cook* v. *United States on behalf of U.S. Department of Labor*, 978 F.2d 164, 166 (5th Cir. 1992) (compliance with administrative claim requirement "is a jurisdictional prerequisite to filing suit under the FTCA"); *Meridian International Logistics, Inc.* v. *United States*, 939 F.2d 740, 743 (9th Cir. 1991) (same); *Cotto* v. *United States*, 993 F.2d 274, 280 (1st Cir. 1993) (same). Federal Rule of Civil Procedure 3 provides that "[a] civil action is commenced by filing a complaint with the court,"

II. THE DISTRICT COURT CORRECTLY DISMISSED PETITIONER'S COMPLAINT WITHOUT PREJUDICE FOR FAILURE TO EFFECT SERVICE "FORTHWITH"

"'Forthwith' connotes action which is immediate, without delay, prompt, and with reasonable dispatch." *Amella* v. *United States*, 732 F.2d at 713. "In matters of practice and pleading it is usually construed, and sometimes defined by rule of court, as within twenty-four hours." *Dickerman* v. *Northern Trust Co.*, 176 U.S. 181, 193 (1900). "Statutes, judgments, orders and contracts requiring an act to be done in a certain number of days contemplate an allowance of a certain personal convenience to perform the act, so long as it is done within the period. A 'forthwith' requirement on the other hand does not contemplate any such convenience." *California Casualty Indemnity Exchange* v. *United States*, 74 F. Supp. 404, 407 (S.D. Calif. 1947). Rather, "[t]he word has a peremptory connotation, even more so than the word 'immediately.'" *Ibid.* See also *United States* v. *Bradley*, 428 F.2d 1013, 1016 (5th Cir. 1970) ("The command of 'forthwith' clearly will not tolerate delay when deliberate and made by the officers for the purpose of selecting their own time and for their own purpose") (internal quotation marks omitted).

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and the Federal Rules do not require plaintiffs to make formal statements of claim prior to filing suit. No one would suggest, however, that the Federal Rules supersede a statutory directive that an administrative claim must be filed as a prerequisite to a particular form of litigation against the government.

The process by which a federal civil complaint is ordinarily filed and served has been described as follows:

> In federal practice the clerk issues the summons. (Under [Federal Rule of Civil Procedure 4(b)], it is signed by the clerk and bears the seal of the court.) This does not necessarily mean that the clerk drafts the summons. The usual practice is for the plaintiff's attorney to obtain from the clerk as many summons copies as are needed, filling them out back at the office when the complaint is drawn. * * *
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> * * * * *
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> * * * [T]he typical procedure is for the plaintiff, when filing the complaint, to have the summons all filled out and ready to tender to the clerk, who can scan it and, if it is in order, "issue" it. * * *
>
> At one time, when the marshals were the chief summons servers in federal practice, the clerk would either forward the summons through channels to the marshal's office or give it to the plaintiff to deliver to the marshal. Now * * * the standard practice is for the clerk, after "issuance", to hand the summons or summonses back to the plaintiff for service. It is now the plaintiff's responsibility.

D. Siegel, *Practice Commentaries*, 28 U.S.C.A. Fed. R. Civ. P. 4, at 85, 96-97 (1992). Thus, the plaintiff in a federal civil action typically (1) obtains summons forms and prepares the summons *before* the complaint is filed, and (2) files the complaint by hand, thus

facilitating immediate issuance and receipt of a signed, sealed summons. Where that procedure is followed, there is no reason that the complaint and summons cannot be served on the United States Attorney, and mailed to the Attorney General, within 24 hours after the complaint is filed.

Accepting petitioner's declarations as true, it is clear that petitioner's trial counsel made no effort to comply with the SAA's requirement that the complaint be served "forthwith." Counsel did not obtain or complete summons forms before filing the complaint, and he does not appear to have filed the complaint by hand.[35] Petitioner's declarations indicate that the untimeliness of service was exacerbated by mistakes in the office of the district court clerk. By the time those problems arose, however, petitioner had already breached his obligation to serve the complaint "forthwith." And even after those problems came to light, counsel's efforts to obtain the relevant documents were limited to sporadic mail communications with the office of the clerk. In short, this is not a case in which counsel made diligent efforts to effect service immediately after filing but was pre-

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[35] Although petitioner's declarations are not entirely clear on this point, petitioner's brief implies that the complaint was filed by mail. See Pet. Br. 4-5 ("At the same time [petitioner] filed his complaint, he requested the appropriate summons forms and file stamped copies of the complaint. However, these summons forms were not sent to [petitioner's] counsel, as requested, with the file stamped copies of the complaint.") (citations omitted). To the extent that filing by hand would have been burdensome, it would have been so only because of trial counsel's unexplained decision to file suit in the Galveston Division rather than in the Houston Division. See page 9 and note 10, *supra*.

vented from doing so by factors beyond his control. The district court therefore acted correctly in dismissing the complaint without prejudice based on petitioner's non-compliance with Section 742.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. The Rules Enabling Act, 28 U.S.C. 2071 *et seq.*, provides in pertinent part:

§ 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

2. The Suits in Admiralty Act, 46 U.S.C. App. 741 *et seq.*, provides in pertinent part:

§ 742. Libel in personam

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or against such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy

thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States or such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

§ 743. Procedure in cases of libel in personam

Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or such corporation may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction. If the libelant so elects in his libel, the suit may proceed in accordance with the principles of libels in rem wherever it shall appear that had the vessel or cargo been privately owned and possessed a libel in rem might have been maintained. Election so to proceed shall not preclude the libelant in any proper case from seeking relief in personam in the same suit. Neither the United States nor such corporation shall

be required to give any bond or admiralty stipulation on any proceeding brought hereunder.

3. Rule 4(j) of the Federal Rules of Civil Procedure (1988) provides:

Rule 4. Process

* * * * *

(j) Summons: Time Limit for Service. If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion. This subdivision shall not apply to service in a foreign country pursuant to subdivision (i) of this rule.

4. Rule 82 of the Federal Rules of Civil Procedure provides:

Rule 82. Jurisdiction and Venue Unaffected

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C., §§ 1391-93.